

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

In re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO *et al.*

Debtors.¹

PROMESA

Title III

No. 17 BK 3283-LTS

(Jointly Administered)

**NOTICE OF CONSTITUTIONAL CHALLENGE
TO FEDERAL STATUTE BY AURELIUS**

Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (“Aurelius”), hereby provide notice under Federal Rule of Bankruptcy Procedure 9005.1² to the Court and the Attorney General of the United States that the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Dkt. 913), and *Motion of Aurelius for Relief from the Automatic Stay* (Dkt. 914) (“the Motions”), filed by Aurelius on August 7, 2017, call into question the constitutionality of the Puerto Rico Oversight, Management, and Economic Stability Act (“PROMESA” or the “Act”), Pub. L. No. 114-187, 130 Stat. 549 (2016), on the grounds that the appointment of

¹ The Debtors in these Title III Cases, along with each Debtor’s respective Title III case number and the last four (4) digits of each Debtor’s federal tax identification number, as applicable, are the (i) Commonwealth of Puerto Rico (Bankruptcy Case No. 17 BK 3283-LTS) (Last Four Digits of Federal Tax ID: 3481); (ii) Puerto Rico Sales Tax Financing Corporation (“COFINA”) (Bankruptcy Case No. 17 BK 3284-LTS) (Last Four Digits of Federal Tax ID: 8474); (iii) Puerto Rico Highways and Transportation Authority (“HTA”) (Bankruptcy Case No. 17 BK 3567-LTS) (Last Four Digits of Federal Tax ID: 3808); and (iv) Employees Retirement System of the Government of the Commonwealth of Puerto Rico (“ERS”) (Bankruptcy Case No. 17 BK 3566-LTS) (Last Four Digits of Federal Tax ID: 9686).

² Bankruptcy Rule 9005.1, made applicable to these proceedings by 48 U.S.C. § 2170, incorporates by reference Federal Rule of Civil Procedure 5.1.

the Board members of the Fiscal Management and Oversight Board for Puerto Rico (“the Oversight Board” or “the Board”) violates the Appointments Clause of the U.S. Constitution and the separation of powers.

Notice of a constitutional challenge to a federal statute is required when “the parties do not include the United States, one of its agencies, or one of its officers or employees in an official capacity.” Fed. R. Civ. P. 5.1(a). Aurelius believes this Notice should be unnecessary because the parties to this Title III proceeding include the Board, which is an agency of the United States, and its members, who are officers of the United States. Dkt. 10.

In any event, “the United States of America” has entered appearances “on behalf of” federal agencies such as the Environmental Protection Agency, Dkt. 619, the Internal Revenue Service, Dkt. 512, and the Alcohol and Tobacco Tax and Trade Bureau, Dkt. 512, in the Title III case pursuant to a rule expressly governing “part[ies].” Fed. R. Bankr. P. 9010(b). The U.S. Army Corps of Engineers has also appeared in the Title III through the Department of Justice Civil Division, pursuant to the same rule. Dkts. 399, 283. The United States and the above-named agencies are listed as creditors, third-party plaintiffs, or interested parties in the PACER docket party report.³ Moreover, the United States Trustee is also a party to the Title III case. *See, e.g.*, Dkts. 340, 338, 192, 77; *see also In re Perry Hollow Mgmt. Co., Inc.*, 297 F.3d 34, 38 (1st Cir. 2002) (“[T]he U.S. Trustee [is] an agency of the United States” who becomes a “‘party’ to a case ... where it has actively participated in the proceedings.”); *Bell v. Thornburg*, 473 F.3d 84, 88 (5th Cir. 2014) (“[T]he U.S. Trustee is an officer of the Department of Justice.”); *In re Revco D.S., Inc.*, 898 F.2d 498, 499 (6th Cir. 1990) (“The United States trustee [is] an officer of the Executive

³ Available at <https://ecf.prb.uscourts.gov/cgi-bin/qryParties.pl?326315>.

branch"); *In re Parvin*, 538 B.R. 96, 100 n.2 (Bankr. W.D. Wash. 2015) (notice of constitutional challenge unnecessary under Bankruptcy Rule 9005.1 because “the [U.S. Trustee] is a party and is an arm of the United States Department of Justice” and thus “the Court need not certify the matter to the United States Attorney General”). And the Attorney General and several other federal agency heads are on the Master Service List, *see* Dkt. 819 at 8, and will thus automatically receive copies of the Motions.

Because the Oversight Board has independent litigation authority, 48 U.S.C. § 2128(b), such that its views on the constitutional question may differ from those of the United States, and to avoid any possible dispute regarding the propriety of the procedures employed in connection with the Motions, Aurelius files this Notice in an abundance of caution and to ensure strict compliance with Bankruptcy Rule 9005.1. Aurelius respectfully requests that pursuant to 28 U.S.C. § 2403 and Bankruptcy Rule 9005.1, the Court enter the proposed order attached as **Exhibit A**.

In compliance with Bankruptcy Rule 9005.1, this Notice is being served upon the Attorney General of the United States via certified mail to:

Att’n: Hon. Jefferson B. Sessions, III
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dated: August 7, 2017

Respectfully submitted,

/s/ Luis A. Oliver-Fraticelli

/s/ Theodore B. Olson

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EXHIBIT A

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In re:

THE FINANCIAL OVERSIGHT AND MANAGEMENT BOARD FOR PUERTO RICO,

as representative of

THE COMMONWEALTH OF PUERTO RICO, *et al.*

Debtors¹

PROMESA

Title III

No. 17 BK 3283-LTS

(Jointly Administered)

Re: Docket No. __

ORDER CERTIFYING CONSTITUTIONAL CHALLENGE

Upon the *Notice of Constitutional Challenge to Act of Congress by Aurelius* (Dkt. __), and pursuant to 28 U.S.C. § 2403 and Federal Rule of Bankruptcy Procedure 9005.1, the Court hereby certifies to the Hon. Jefferson B. Sessions, III, Attorney General of the United States that:

1. On August 7, 2017, Aurelius Investment, LLC, Aurelius Opportunities Fund, LLC, and Lex Claims, LLC (“Aurelius”), filed the *Objection and Motion of Aurelius to Dismiss Title III Petition* (Dkt. 913), as well as the *Motion of Aurelius for Relief from the Automatic Stay* (Dkt. 914) (“the Motions”), both of which call into question the constitutionality of the Puerto Rico Oversight,

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Management, and Economic Stability Act (“PROMESA” or the “Act”), Pub. L. No. 114-187, 130 Stat. 549 (2016), on the grounds that the appointment of the Board members of the Fiscal Management and Oversight Board for Puerto Rico violates the Appointments Clause of the U.S. Constitution and the separation of powers.

2. Because the United States and at least one of its agencies or officers are parties to the Title III case and were in fact served with the Motions, the United States shall respond to the Motions, if at all, within the timeline provided for under this Court’s *First Amended Notice, Case Management and Administrative Procedures*, Dkt. 262-1, and not pursuant to the timeline provided for by Bankruptcy Rule 9005.1.

SO ORDERED.

Dated: _____
San Juan, Puerto Rico

LAURA TAYLOR SWAIN
United States District Judge